80-1686

No. ———

Office-Supreme Court, U.S.
FILED
APR 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
(Adams Extract Co., et al. real parties in interest),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FLETCHER H. ETHERIDGE
BUTLER, RINION, RICE, COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3219

HAROLD F. BAKER
ALAN WISEMAN
ROBERT F. RUYAK
ROBERT L. GREEN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Counsel of Record for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. This court should grant the writ because the trial court has curtailed the right to trial by jury by ordering, after the jury's verdict and dismissal, supplemental evidentiary proceedings before a special master so that plaintiffs can attempt to prove the essential element of dollar damages which they failed to prove during the jury trial.

2. This Court should grant the writ to resolve an important and current issue of Seventh Amendment law on which the lower federal courts have exhibited considerable uncertainty: whether this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.* authorizes federal trial courts to divide a single cause of action into two parts to be tried before two different fact finders.

3. This Court should grant the writ because the trial court, by reopening the record *after* the close of the trial and ordering a continuation of the trial on the issue of damages before a second fact finder, has so far departed from accepted judicial practice that intervention by this Court is warranted.

LIST OF PARTIES

The party appearing as the defendant-petitioner before the United States Court of Appeals for the Fifth Circuit and as the defendant before the district court was The Mead Corporation.*

---

*Pursuant to Rule 28.1 of the Rules of the Supreme Court, as amended, the following entities are subsidiaries and affiliates of petitioner, The Mead Corporation: Altonaer-Wellpappenfabrik G.m.b.H.; British Columbia Forest Products Ltd.; Brunswick Pulp & Paper Co.; Europapel, S.A.; Graficarton, S.A.; Georgia Kraft Company; Gulf Supply Latina; Harima M.I.D.; Kraft Land Services, Inc.; Northwood Forest Industries Ltd.; Northwood Panel-

The parties appearing as plaintiffs-respondents before the United States Court of Appeals for the Fifth Circuit and as plaintiffs before the district court were

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares

---

board Company; Packagemaster Limited; Schoeller Photo Papers, Inc.; Schoeller Technical Papers, Inc.; Schoeller Technical Papers; Seaboard Paper Company; Mead Chemicals, Inc.; Mead-Emballage, S.A.; Mead Imballagi, S.p.A.; Mead-Toppan Company, Ltd.; Mead Verpackung G.m.b.H.; and Mead Verpakking B.V.

Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.

Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

Other defendants named in the original complaint in this litigation were

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	i
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
I. Preliminary Statement	2
II. History of Proceeding	4
A. Background Information	4
1. The Civil Complaints	4
2. The Related Criminal Cases In Which Mead Was Acquitted	4
3. Settlements in the Civil Cases	5
4. The Civil Trial Proceedings	5
5. The Jury Verdict	10
B. The District Court's Post-Verdict Orders	10
REASONS FOR GRANTING THE WRIT	12
I. By Permitting Plaintiffs to Attempt to Prove an Essential Fact Before a Second Fact Finder in a Subsequent Proceeding, After Dismissal of the Jury, the District Court Has Decided an Important Question of Federal Law Which Conflicts with Principles Established in Numerous Seventh Amendment Decisions of this Court	12

PRECEDING PAGE WAS BLANK

TABLE OF CONTENTS—Continued

Page

A. This Court Must Scrutinize an Infringement of the Right to Jury Trial 12

B. Reopening the Record, After the Jury's Verdict and Dismissal, for the Admission of Additional Evidence Before a Second Fact Finder Violates Mead's Right to a Jury Trial 14

C. *Gasoline Products Co.* v. *Champlin Refining Co.* Does Not Sanction Withdrawing an Essential Issue of Fact from the Jury 15

II. This Court Should Grant the Writ Because the Trial Court, by Reopening the Record After the Close of the Trial and Ordering a Continuation of the Trial on the Issue of Damages Before a Second Fact Finder, Has so far Departed from Accepted Judicial Practice that Intervention by this Court Is Warranted 20

III. Mandamus Prior to the Second Proceeding Is the Appropriate Remedy to Prevent the Denial of a Party's Right to a Jury Trial 21

CONCLUSION 22

APPENDIX

TABLE OF AUTHORITIES

Cases	Page
Alabama v. *Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978)	18
Arthur Young & Co. v. *United States District Court*, 549 U.S. 686 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)	17
Baltimore & Carolina Line, Inc. v. *Redman*, 295 U.S. 654 (1935)	14
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	2, 12, 13, 21
Capital Traction Co. v. *Hof*, 174 U.S. 1 (1899)	14
Colgrove v. *Battin*, 413 U.S. 149 (1973)	14, 19, 20
Collins v. *Riley*, 104 U.S. 322 (1881)	13, 15
Curtis v. *Loether*, 415 U.S. 189 (1974)	14
Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962)	3, 12, 13, 21
Dimick v. *Schiedt*, 293 U.S. 474 (1935)	3, 12, 13, 20
Ex parte Simons, 247 U.S. 231 (1918)	3, 21, 22
Franchi Construction Co. v. *Combined Insurance Co. of America*, 580 F.2d 1 (1st Cir. 1978)	17
Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494 (1931)	i, 12, 15, 16
Hodges v. *Easton*, 106 U.S. 408 (1882)	10, 13, 14, 15
Hosie v. *Chicago & North Western Railway*, 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961)	18
In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978)	4
In re Corrugated Container Antitrust Litigation, 441 F. Supp. 921 (J.P.M.D.L. 1977)	4
In re Folding Carton Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977)	18
In re Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D. Ill. 1978)	17
In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1979)	18
In re Winn, 213 U.S. 458 (1909)	3, 22
Jacob v. *New York City*, 315 U.S. 752 (1942)	12

TABLE OF AUTHORITIES—Continued

	Page
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957)	3, 22
Link v *Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977)	18
Martin v. *Bell Helicopter Co.*, 85 F.R.D. 654 (D. Colo. 1980)	17
Payton v. *Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979)	17
Pruitt v. *Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980)	18
Response of Carolina, Inc. v. *Leasco Response, Inc.*, 537 F.2d 1037 (5th Cir. 1976)	18
Rogers v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957)	12
Slocum v. *New York Life Insurance Co.*, 228 U.S. 364 (1913)	15
Suydam v. *Williamson*, 61 U.S. 427 (1858)	15
Terrell v. *Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974)	18
United Air Lines, Inc. v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961)	17
United States Alkali Export Association v. *United States*, 325 U.S. 196 (1945)	22
United States v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S.D. Tex. filed Jan. 25, 1978)	4
United States v. *International Paper Co.*, Cr. No. H-78-11 (S.D. Tex. filed Jan. 25, 1978)	4
Ward v. *Cochran*, 150 U.S. 597 (1893)	10, 12, 13, 15

CONSTITUTION

U.S. Const. amend. VII	2

FEDERAL RULES

Fed. R. App. P. 21	3
Fed. R. Civ. P. 23	19

TABLE OF AUTHORITIES—Continued

STATUTES	Page
15 U.S.C. § 1 (1976)	4
28 U.S.C. § 1254(1) (1976)	2
All Writs Act, 28 U.S.C. § 1651 (1976)	3
MISCELLANEOUS	
6A Moore's *Federal Practice* (2d ed. 1979)	14
O. Holmes, *Collected Legal Papers* (1920)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Mead Corporation ("Mead"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit denying Mead's Petition for Writ of Mandamus to vacate certain district court orders which deprive Mead of a jury trial in this class action litigation.

OPINIONS BELOW

The judgment sought to be reviewed by this petition for writ of certiorari was entered by the Court of Appeals for the Fifth Circuit without opinion. The Fifth Circuit's order and the unpublished district court orders which deprive Mead of its right to a jury trial are included in the Appendix at 1a-27a.

JURISDICTION

The Court of Appeals for the Fifth Circuit denied Mead's petition for a writ of mandamus on March 13, 1981, and Mead's petition for reconsideration on March 25, 1981. This petition for writ of certiorari was filed within 60 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Seventh Amendment of the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

STATEMENT OF THE CASE

I. Preliminary Statement

Mead is the only defendant which proceeded to trial through jury verdict in the *Corrugated Container Antitrust Litigation* class action.[1] The trial is over. The jury returned a special verdict and was dismissed on September 13, 1980. No judgment has been entered on the special verdict. Instead, on January 27, 1981, the district court, over Mead's objection, reopened the trial record and appointed a special master to conduct a protracted evidentiary proceeding to obtain evidence *outside* the trial record for the sole purpose of curing plaintiffs' failure of proof on the crucial jury issue of damages in order to support a judgment against Mead.

This petition for certiorari raises an important federal question because the district court's orders curtail

---

[1] *In re Corrugated Container Antitrust Litigation*, MDL 310, (S.D. Tex.). Citations to the record are included in the accompanying Appendix and are cited hereafter as App. at ——.

the right to a jury trial in antitrust class actions contrary to the principles enunciated by this Court in scores of cases. The Seventh Amendment does not permit supplemental proceedings, after the jury's verdict and dismissal, which allow plaintiffs to attempt to prove dollar damages before a second fact finder which they failed to prove during the first jury trial. Mandamus is the appropriate remedy to stop the illegal proceeding, rather than wait for an appeal after the illegal proceeding takes place. *See, e.g., Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Dimick* v. *Schiedt*, 293 U.S. 474 (1935); *Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *In re Winn*, 213 U.S. 458, 466-67 (1909).

By these post-verdict proceedings, Mead is being affirmatively subjected to continuing unconstitutional procedures. On February 13, 1981, Mead petitioned the United States Court of Appeals for the Fifth Circuit pursuant to the All Writs Act, 28 U.S.C. § 1651 (1976), and Rule 21, Fed. R. App. P., to direct the district court to

> (1) vacate its orders reopening the trial record and appointing a special master to obtain evidence *outside* the trial record, and
>
> (2) enter judgment based solely upon the trial record.

The Court of Appeals, without opinion, denied Mead's mandamus petition.

II. History of Proceeding

A. Background Information

1. *The Civil Complaints*

Plaintiffs alleged that, since at least January 1, 1960, 37 manufacturers of corrugated containers and sheets engaged in a single nationwide conspiracy to raise, fix, maintain and stabilize the prices of corrugated containers and sheets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[2] The district court certified classes consisting of all persons in the United States who purchased corrugated containers or corrugated sheets from any defendant at any time during the period from January 1, 1960 to January 25, 1978, approximately 200,000 in number.[3]

2. *The Related Criminal Cases In Which Mead Was Acquitted*

The civil complaints were precipitated by a federal grand jury investigation which culminated in two indictments charging 14 corporations and 26 individuals with participating in an almost nationwide conspiracy to fix prices of corrugated containers and sheets.[4] Most of the defendants entered pleas of *nolo contendere* and received fines as their sentences. Mead, Continental Group and seven individual defendants entered pleas of not guilty and proceeded to trial on January 22, 1979. On April 27, 1979, Mead and the other defendants were *acquitted* by unanimous jury verdict.

---

[2] *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.L. 1977).

[3] *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

[4] *United States* v. *International Paper Co.*, Cr. No. H-78-11, and *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S.D. Tex. filed Jan. 25, 1978).

3. *Settlements in the Civil Cases*

Prior to the civil class action trial, 34 of the 37 defendants settled for an aggregate amount in excess of $300 million, which now, with accumulated interest, approximates $400 million. Under those agreements, settling defendants did not remove their sales from the litigation. Thus, plaintiffs were able to extract substantial amounts from each succeeding defendant who settled because of the increased exposure to them created by prior settlements. Mead and two other defendants proceeded to trial, although the other two settled during the trial. Mead was the only defendant to proceed to verdict. While Mead's market share is only 2½ percent, plaintiffs seek treble damages against Mead based upon the total sales of 18 alleged "co-conspirators," even though such "co-conspirators" have settled. Plaintiffs claim that damages against Mead when ultimately determined in this illegal post-trial proceeding will be in the hundreds of millions of dollars, possibly as high as a billion dollars.

4. *The Civil Trial Proceedings*

The following facts are undisputed:

a. Prior to trial, at the May 16, 1980, pretrial hearing, the district court ordered that the trial would *not* be bifurcated, and that the issues of liability and damages would be tried before a single jury, stating:

> THE COURT: Bifurcation of liability and damages, no.
>
> MR. BAKER: What did you say on that, Judge?
>
> THE COURT: No. I am not going to bifurcate.[5]

b. On June 9, 1980, the trial commenced as a single, unified non-bifurcated jury trial. The district court instructed the jury at the outset that "the plaintiffs have

---

[5] May 16, 1980, Pretrial Hearing at 60, App. at 28a; Pretrial Order No. 51, dated May 23, 1980, App. at 30a.

the burden of proving each essential element of their case," *i.e.*, conspiracy, impact and damages.[6]

c. Plaintiffs' liability evidence at trial consisted of six live industry witnesses and the reading of the transcripts of some grand jury and criminal trial witnesses who testified to instances of price exchanges in a few local markets. In addition, plaintiffs introduced proof that 176 witnesses, all of whom had been represented by attorneys, had earlier asserted their Fifth Amendment privileges, and a map showing these witnesses' alleged employment locations throughout the United States. One hundred sixty-eight of these employees had not worked for Mead, most having worked for Mead's settling co-defendants. None of the Fifth Amendment assertions had been introduced at the earlier criminal trial.

d. Plaintiffs' theory of damages was based upon an expert witness' econometric model which relied on nationwide average industry data, unrelated to Mead data or plaintiffs' purchases. Plaintiffs' expert testified that class members were damaged between 7.7 to 19.3 percent, but did not testify as to the amount of dollar damages sustained by class members.[7]

e. Plaintiffs attempted to prove purchases of class members as a predicate for dollar damages by offering evidence of gross sales of manufacturers of corrugated containers and sheets, irrespective of whether the sales were to class members. The district court, however, did not admit this evidence.[8]

f. At the close of plaintiffs' case-in-chief on July 28, 1980, the district court denied Mead's motion for a

---

[6] Tr. Vol. 1 at 37, 39-40, 45, 58-59; App. at 32a-35a.

[7] Tr. Vol. 49 at 105-06, App. at 36a; Tr. Vol. 50 at 222-23, App. at 37a-38a.

[8] Tr. Vol. 55 at 188-89, App. at 39a-40a; Tr. Vol. 95 at 63-64, App. at 46a.

directed verdict. However, the district court stated that such proof of dollar damages was an indispensable element of plaintiffs' case. Accordingly, the district court took the extraordinary step of permitting plaintiffs to rest, subject to reopening the record, prior to submission to the jury, to cure their failure of proof of dollar damages.[9]

g. Subsequently, however, plaintiffs made no attempt to offer in evidence by stipulation or otherwise, class members' purchases or the dollar damages purportedly sustained by class members. The reason for their failure (whether tactical or otherwise) is immaterial.[10] The fact is they knowingly offered nothing and went to the jury without damage proof.

h. The district court specifically laid the blame on plaintiffs, stating:

> Plaintiffs apparently never made any effort to reach a stipulation. Of course, it was not the responsibility of defendants to do so. *If there is any blame to be assigned in this regard, it lies at the plaintiffs' door.*[11]

i. Plaintiffs now propose to make the damage proof before the special master which they unsuccessfully attempted before the jury.

j. After Mead rested its defense, plaintiffs, on September 5, 1980, stated for the first time that they would forego proving at trial the alleged dollar damages sustained by class members. On that date, plaintiffs filed

---

[9] Tr. Vol. 55 at 212, App. at 40a.

[10] Mead believes that plaintiffs knew that the jury, which had heard the limited evidence of liability, would never return a verdict against sole defendant Mead in the hundreds of millions of dollars. Thus, plaintiffs deliberately attempted to dissect the case, keeping from the liability jury the amount of dollar damages and keeping from the damage fact finder the limited evidence of liability.

[11] Pretrial Order No. 61 at 3, Ap. at 12a.

their Memorandum in Support of Their Proposed Special Verdict Form wherein they suggested submitting to the jury the damage issue in terms of a percentage overcharge as a "measure of damages," with possible post-verdict proceedings before a special master or a new jury to determine the amount of damages allegedly sustained by class members.

k. The next day, September 6, 1980, Mead vigorously objected, stating:

> The Court in this case specifically declined to grant a bifurcated trial and ordered that the issues of liability and damages would be tried together. To now change that ruling, as plaintiffs suggest, and have the Court determine disputed issues of fact as to impact and damages in the event liability is found would be unfair, constitute a denial of due process and a denial of trial by jury.[12]

l. Two days later, on September 8, 1980, after the close of all evidence, the district court, during arguments on jury instructions, recognized plaintiffs' failure of proof of amount of damages and Mead's position relating thereto:

> MR. BAKER: (Quoting from the district court's Charge to the Jury.) "You are asked to find the amount of the overcharge, if any, in terms of percentage." I want [that] in terms of a *dollar overcharge.*
>
> THE COURT: Oh, I know that. I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way.
>
> MR. BAKER: Well, how are you ever going to come up with damages?
>
> . . . .
>
> THE COURT: I don't see how I can submit it any other way.

---

[12] Letter of September 6, 1980, Harold F. Baker to Honorable John V. Singleton, Jr., at 3, App. at 43a.

MR. BAKER: Well, I can suggest how you can submit it.

THE COURT: How? *There is no dollar figure here for them to find.*

MR. BAKER: They have claims that were made here by the class members against the settlement funds and they know exactly what those claims are.

. . . .

THE COURT: That is not in evidence here.

MR. BAKER: It is their burden of proof.

THE COURT: *I understand your point is that if they have failed to prove damages, that's just too bad, they failed.*

MR. BAKER: You bet your life.

THE COURT: But I'm stuck with a charge on what has been put into evidence in this case, and if the plaintiffs—

MR. BAKER: *Well, then, I'm entitled to a directed verdict right now.*

THE COURT: *I understand your point.*[13]

m. It was not until September 8, 1980, after the trial record was closed and the jury instructions were resolved, that the district court decided to submit to the jury only the issue of "measure of damages" and *not* the crucial fact issue of amount of damages purportedly sustained by class members.[14] Now the district court proposes to

---

[13] Tr. Vol. 94 at 145-47, App. at 44a-45a; Tr. Vol. 96 at 292, App. at 47a; Tr. Vol. 100 at 14-15, App. at 48a.

[14] Tr. Vol. 94 at 145-47, App. at 44a-45a. Plaintiffs' contention that during the trial the district court indicated the "possibility" that the jury would not determine dollar damages does not cure the denial of Mead's right to jury trial. Prior to trial, the district court ordered a non-bifurcated trial on all issues. Even the district court admits that it did not reverse its no-bifurcation decision before September 8, 1980, after the close of all the evidence, when, according to the district court, it did so implicitly by ruling on the jury instructions. Pretrial Order No. 61 at 6, App. at 16a.

allow plaintiffs to prove before the Special Master exactly what they tried and failed to prove before the jury even though the court gave them a second chance to prove dollar damages by holding open the trial record for that specific purpose prior to submission of the case to the jury.

5. *The Jury Verdict*

The case was submitted to the jury on September 11, 1980. On September 13, 1980, the jury returned the special verdict against Mead and was dismissed.[15]

> The jury found Mead to be a member of a conspiracy to fix, raise, maintain or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.[16]

With respect to the damages question, the jury found that purchasers were damaged "5 percent." Although the law is established that a special verdict must find all the essential facts to support a judgment,[17] and although Mead requested that the jury be required to find the dollar amount of damages, if any, purportedly sustained by class members, the jury was not asked to find and did not make any such finding.

B. The District Court's Post-Verdict Orders

A month after the jury's dismissal, plaintiffs, on October 10, 1980, moved for the appointment of a special master to conduct additional discovery and obtain evi-

---

[15] Tr. Vol. 102 at 49, App. at 56a.

[16] Special Vedict at 1, App. at 49a.

[17] *E.g.*, *Ward* v. *Cochran*, 150 U.S. 597, 608 (1893); *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882).

dence by compulsory process outside the trial record, to support a dollar judgment against Mead.[18]

On January 27, 1981, the district court appointed a special master to supervise the post-verdict proceedings to supplement the trial record to support the entry of a damage judgment against Mead. The district court ordered "that a fund be created in the amount of $250,000" to compensate the master and pay other expenses, which fund "shall be replenished as the court may direct." [19] Pursuant to the district court's order, the special master is to prepare a report on damages based upon evidence *outside* the trial record.[20] The district court further ordered that:

> After the master has filed his final report, the court may hold hearings as it deems appropriate to resolve all matters not previously resolved by summary judgment. At any such hearing, the master's final report shall constitute *prima facie* evidence on all issues addressed by the court.

The parties at such hearings, moreover, "shall be limited to the arguments and evidence presented to the master prior to the formulation of the master's final report."

Through these post-verdict proceedings, plaintiffs seek to prove before the special master the dollar damages they tried and failed to prove before the jury.

The post-verdict evidentiary proceedings have not yet begun. On April 8, 1981 the Special Master will hold hearings on objections to interrogatories served by plain-

---

[18] Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment, filed Oct. 10, 1980. Plaintiffs did not move for a new trial on the issue of damages.

[19] The initial fund was subsequently reduced to $50,000 by the district court, apparently after Mead's mandamus petition was filed, although it is still subject to supplementation.

[20] Pretrial Order No. 62, App. at 22a.

tiffs upon Mead and 18 companies which previously settled.[21]

REASONS FOR GRANTING THE WRIT

I. By Permitting Plaintiffs to Attempt to Prove an Essential Fact Before a Second Fact Finder in a Subsequent Proceeding, After Dismissal of the Jury, the District Court Has Decided an Important Question of Federal Law Which Conflicts with Principles Established in Numerous Seventh Amendment Decisions of this Court.

The question presented by this petition is whether, consistent with the Seventh Amendment, a district court can decide after the close of the evidence not to submit to the jury the crucial issue of dollar damages; and, after the jury's verdict and dismissal, reopen the trial record before a second fact finder for proof of damages which plaintiffs tried and failed to establish before the jury. The decisions of the Court construing the Seventh Amendment prohibit such a practice.

Nonetheless, in recent years, lower courts, misconstruing this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), have approved the practice of dividing a single cause of action for trial before two different fact finders. This court should grant the writ and state the appropriate rule.

A. This Court Must Scrutinize an Infringement of the Right to Jury Trial.

For over a century, the Court has repeatedly granted certiorari to review district court orders which infringe upon a party's Seventh Amendment right to a jury trial. *E.g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957); *Jacob* v. *New York City*, 315 U.S. 752 (1942); *Dimick* v. *Schiedt*, 293 U.S. 474 (1935); *Ward* v.

---

[21] Notice of Master's Hearing, App. at 57a-58a.

Cochran, 150 U.S. 597 (1893); *Hodges* v. *Easton*, 106 U.S. 408 (1882); *Collins* v. *Riley*, 104 U.S. 322 (1881).

In *Beacon Theatres*, the Court repeated its statement of fifty years earlier as to the reason for granting certiorari in such cases:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935).

359 U.S. at 501. The Court further stated that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade." *Id.* at 504. The Court noted that "*it is particularly undesirable to have some of the relevant considerations* [in determining a violation of the antitrust laws] *tried by one fact finder and some by another.*" *Id.* at 508 n.10.

Similarly, in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470 (1962), the Court granted certiorari and reversed the court of appeals' denial of a mandamus petition to reinstate a jury demand stricken by the district court, stating that certiorari was granted

> because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions.

The district court's post-verdict orders reopening the trial record, after the jury's verdict and dismissal, for a supplemental proceeding before a second finder of fact is another attempt to curtail the right to trial by jury which this Court should scrutinize. Here, plaintiffs attempted to prove the amount of damages before the jury and failed. They now seek to prove those damages

befor a second fact finder in these post-verdict proceedings, although that fact finder will never hear the evidence presented to the jury.

B. Reopening the Record, After the Jury's Verdict and Dismissal, for the Admission of Additional Evidence Before a Second Fact Finder Violates Mead's Right to a Jury Trial.

The Seventh Amendment to the United States Constitution "preserves" the right to trial by jury in the federal courts in the manner in which trial by jury was historically conducted. *E.g.*, *Colgrove* v. *Battin*, 413 U.S. 149, 152 (1973); *Curtis* v. *Loether*, 415 U.S. 189, 192-94 (1974); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8-9 (1899).

It is axiomatic that a plaintiff is required to present all of its proof in support of its cause of action before the jury. After the record has been closed and the jury dismissed, the trial court has no discretion to *reopen* the record in order to admit additional evidence before a second fact finder. The district court orders violate the established rule that where plaintiffs' evidence is insufficient to support a verdict, judgment must be entered for the defendant. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935). 6A Moore's *Federal Practice* ¶ 59.04[13], at 59-31 (2d ed. 1979).

An integral and fundamental part of trial by jury has always been that *the* jury, a single jury, would decide the entire case, or at least all factual issues presented. This principle was expressed firmly and clearly in *Hodges* v. *Easton*, 106 U.S. 408 (1882). There the Court disapproved the withdrawal from the jury, for resolution at a separate proceeding, of certain "undisputed" fact issues relating to damages. Justice Harlan stated for the Court:

> The record discloses that the jury determined a part of the facts, while other facts, upon which the final

> judgment was rested, were found by the court to have been conceded or not disputed. . . . [W]e then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, [it would] have authorized the withdrawal of the case altogether from the jury. . . . The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. . . .

Id. at 411-12. The same principle has been applied to other cases where special verdicts were employed. The jury, in a special verdict, as here, must find on *every essential fact* on which the Court's judgment is based. *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 388 (1913); *Ward* v. *Cochran*, 150 U.S. 597, 608 (1893); *Suydam* v. *Williamson*, 61 U.S. 427 (1858); *Collins* v. *Riley*, 104 U.S. 322, 327 (1881). These cases have never been overruled or even questioned by any subsequent decision of this Court.

C. *Gasoline Products Co.* v. *Champlin Refining Co.* Does Not Sanction Withdrawing an Essential Issue of Fact From the Jury.

Relying on *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), several lower federal courts faced with the pressures of managing class actions in antitrust cases have sanctioned the practice of dividing a single cause of action for trial before two separate fact finders. Others have expressed confusion or uncertainty concerning the propriety of this practice.

Gasoline Products does not support such a practice and this Court should grant the writ and resolve the confusion which that case has generated.

In *Gasoline Products*, a trial was had on liability and damages to a single jury. The court of appeals had affirmed the jury's verdict on liability, but reversed the district court "with respect to the measure of damages" and ordered a new trial limited to the damage issue only, rather than ordering a retrial on the jury's unimpeached verdict on liability. The question presented to the Court on certiorari was whether the new trial could be so limited. The Court stated that the Seventh Amendment did not require that an issue

> once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury. *Id.* at 498.

Nevertheless, the Court reversed the decision of the court of appeals and ordered a new trial on all issues, finding that they were inextricably interwoven.

There is nothing, not a hint, that the Court in *Gasoline Products* had any notion that it was overruling *Hodges* or was generally authorizing district courts to divide the trial of a single case between two juries—one to find on liability and the other to find on damages—or to divide the damage issue between "measure of damages" and "amount of damages." Indeed, for some 45 years following the *Gasoline Products* decision, no lower court interpreted that case as authorizing the division of the trial of a single cause of action between two juries.[22]

In the last five years, however, a few courts have misapplied *Gasoline Products*, reformulating its holding as a possible basis for bifurcating *pretrial* the liability issue

---

[22] Bifurcation in the same of separating issues before the *same* jury, which Mead requested before trial, is not here in issue.

from the damage issue to be tried before two different fact finders.

The Court of Appeals for the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961), originally found that a submission of liability and damages to two different juries was improper, but in *Arthur Young & Co.* v. *United States District Court*, 549 F.2d 686, 693 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), the court of appeals approved such a division where the issues were not interwoven, relying on *Gasoline Products*, asserting that the rules for "contemporary courts faced with modern litigation of substantial complexity" had changed. *See also In re Gap Stores Securities Litigation*, 79 F.R.D. 283, 305 n.22 (N.D. Cal. 1978).

The Court of Appeals for the First Circuit reversed a separation of issues on liability and damages before two different juries in *Franchi Construction Co.* v. *Combined Insurance Co. of America*, 580 F.2d 1, 7 (1st Cir. 1978), but it asserted that the practice of dividing single cases for trial before different juries could be proper in certain situations under *Gasoline Products*. Following the dicta in *Franchi Construction Co., supra*, the district court in *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 394 (D. Mass. 1979), held that issues in a single class action may be divided up and tried before different juries where the issues are distinct.

A district court in the Tenth Circuit in *Martin* v. *Bell Helicopter Co.*, 85 F.R.D. 654, 659-60 (D.Colo. 1980), has also approved the use of two juries where the issues were distinct and separable, citing *Gasoline Products*.

Other courts have expressed uncertainty as to whether or not *Gasoline Products* authorizes the use of two different juries to try two parts of the same cause of action. The Seventh Circuit Court of Appeals expressly reserved ruling on the issue of submitting part of a case to a second jury, stating:

> [W]e do not face that question on this appeal. Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury is a more difficult question to resolve.

Hosie v. *Chicago & North Western Railway*, 282 F.2d 639, 642 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). The district court, in the *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727, 735 (N.D. Ill. 1977), stated that bifurcated trials were constitutional, "especially where the same jury tries both the issues of liability and damages unless the parties agree otherwise."

The Second and Third Circuits have expressed uncertainty on this issue. *In re Master Key Antitrust Litigation*, 528 F.2d 5, 15 (2d Cir. 1975); *Link* v. *Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 862 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977).

Although the Fourth Circuit has never addressed the issue of bifurcating issues before *different* juries, the district court in *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100, 117 n.8 (E.D. Va. 1980), a class action, stated that "[i]t is unclear whether, under *Gasoline Products Co.* v. *Champlin Refining Co.*, . . . the same jury that tries the issue of liability must try individual damages as well." Nevertheless, the district court contemplated using a single jury.

Finally, Fifth Circuit decisions suggest that separation of issues even before the *same* jury should be approached with "trepidation" and "is not the usual course that should be followed." *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1323-24 (5th Cir. 1976); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974).

By these post-verdict proceedings, plaintiffs are seeking to convert the jury's "5% verdict" into a $1 billion judgment through the use of a second fact finder which did not hear the evidence presented to the jury. *Gasoline Products* could not have sanctioned this procedure, and the facts of this case underscore the wisdom of *Hodges*. The ultimate issue in any civil case is the dollars the defendant may have to pay to the plaintiff. The idea of trying liability and measure of damages to one jury and amount of damages to another, separates two inseparable parts of a single case. Obviously, evidence pertaining to "amount of damages" is relevant to a determination of "measure of damages" and vice versa. The credibility, substantiality, and validity of the theory of "measure of damages" is directly affected by the "amount of damages" resulting from its application. The jury must consider all the evidence together. In this case, however, the jury was told that the dollar damages resulting from the percentage overcharge measure of damages was *immaterial*. Mead, therefore, was deprived of having the jury determine the dollar consequences of the verdict.

While tactical incentives to divide inseparable issues in class actions are apparent, Rule 23 did not and could not authorize this result. This practice, by leaving no jury responsible for the whole *case*, has the effect of depriving a defendant of the standards of fairness and equity which a jury brings even to a complex case and which is the defendant's right under the Seventh Amendment. By separating part of the case away from the jury, Mead—with a 2½ percent market share—may suffer a judgment grotesque in comparison to any injury the jury could possibly believe that it caused.

Trial by a jury of laymen was important to the founders because juries represent the layman's common sense, the "passional elements in our nature" and, thus, keep the administration of law in accord with the wishes and feelings of the community. O. Holmes, *Collected Legal Papers* 237 (1920). The purpose of a jury trial

in civil cases is "to assure a fair and equitable resolution of factual issues." *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973).

The Court has been particularly sensitive to the jury's role as assessor of damages in a civil case. In *Dimick* v. *Schiedt*, 293 U.S. 474, 478, 480 (1935), the Court stated:

> After pointing out the jealous regard of the American people, as evidenced by constitutions and legislation, for the right of jury trial, the court said that the judgment of the jury had been incorporated as an indispensable element in the judicial administration of the country; that in all cases sounding in damages, these damages must be assessed by the jury and not by the court independently thereof; . . .
>
> * * *
>
> [i]t was always admitted "that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."

Having tried the case as a single jury trial on all issues and the jury having returned its special verdict, Mead is being deprived of that jury trial by the district court's post-jury verdict orders submitting the dollar damage issue to a second fact finder. There is no legal support for the district court's post-verdict orders.[23]

II. This Court Should Grant the Writ Because the Trial Court, by Reopening the Record After the Close of the Trial and Ordering a Continuation of the Trial on the Issue of Damages Before a Second Fact Finder, Has so far Departed from Accepted Judicial Practice that Intervention by this Court Is Warranted.

The trial judge below did not decide to try the issue of damages to a second fact finder until *after* the end of the jury trial. Such a practice has never been sanc-

---

[23] Nor is discretion involved. Plaintiffs did not seek a new trial.

tioned by any court in the land. In every case which has permitted any kind of bifurcation of issues, the trial court has always entered a *pretrial* bifurcation order so that the parties and the court clearly understood prior to trial what issues would be tried in each phase of the proceedings. At least in the absence of a pretrial order that a trial will be divided, centuries of jurisprudence have established the proposition that when a jury has been dismissed, the trial is over. Any mistakes or omissions made by a litigant cannot then be made up by impaneling a new jury to hear more evidence. Finality of litigation requires this result. Otherwise, every verdict would be subject to a post-trial "bifurcation" order. By ordering a second proceeding on damages and by issuing the order for the first time *after* the conclusion of the trial, the trial court has so departed from accepted judicial procedure as to warrant intervention by this Court.

III. Mandamus Prior to the Second Proceeding Is the Appropriate Remedy to Prevent the Denial of a Party's Right to a Jury Trial.

Certiorari to review the Court of Appeals' refusal to issue a writ of mandamus to vacate the district court's orders is the appropriate method of reviewing the issue presented here. Under numerous cases decided by the Court, it is established that Mead is entitled to have the illegal proceeding stopped *now*, before it begins, rather than wait for an appeal. In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959), the Court held: "We think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Accord, Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962).

Ex parte Simons, 247 U.S. 231 (1918), established that mandamus should issue before the second proceeding commences rather than review its legality on appeal. The Court said:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with *now*, before the plain-

> tiff is put to the difficulties and the Courts to the inconvenience that would be raised by [the illegal proceeding]. (emphasis added).

Id. at 239-40. *See also In re Winn*, 213 U.S. 458, 466-67 (1909). *Accord, La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *United States Alkali Export Association* v. *United States*, 325 U.S. 196 (1945).

The district court has no discretion to reopen proceedings after the jury verdict and the jury's dismissal and to order protracted non-jury proceedings before a special master to obtain evidence outside the trial record. The district court has no discretion to infringe on Mead's right to have the claims against it determined by a jury trial either by denying a jury trial *ab initio* or by taking a jury trial away, once had. Rather than waiting to erase the separate damages proceeding, the Court should decide now that the Seventh Amendment requires a trial of the case before a single jury. The failure of the Court of Appeals to exercise mandamus jurisdiction under these circumstances justifies allowance of a writ of certiorari by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FLETCHER H. ETHERIDGE
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3219

HAROLD F. BAKER
ALAN WISEMAN
ROBERT F. RUYAK
ROBERT L. GREEN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Counsel of Record for Petitioner

Dated: April 7, 1981